

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Rulemaking and Declaratory)	CG Docket Nos. 02-278, 05-338
Ruling of Craig Moskowitz)	
and Craig Cunningham)	

To: The Commission

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (“VON”)¹ respectfully files these comments in opposition to the petition for rulemaking and declaratory ruling submitted by Craig Moskowitz and Craig Cunningham (collectively “Petitioners”) in the above-captioned proceeding (the “Petition”).² VON requests the Commission deny the Petition seeking to re-define “prior express consent” to require not only express consent, but express consent (i) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls, (ii) at a specified telephone number, and (iii) in writing for all calls made to wireless and residential lines subject to the Telephone Consumer Protection Act (“TCPA”).³

As an initial matter, the Commission should review the Petition in light of Petitioners’ admission that Petitioner Cunningham is a plaintiff in a pending TCPA litigation and Petitioner

¹ The VON Coalition is the leading advocacy organization for the Internet communications industry, working with legislators, regulators, and other policymakers to develop policies that support the availability and adoption of Internet communications. For more information see www.von.org.

² See FCC, Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent Under The Telephone Consumer Protection Act of 1991, DA 17-144 (rel. February 8, 2017) (“Notice”). See also Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Jan. 22, 2017) (“Petition”).

³ *Petition* at 2, 40.

Moskowitz is a potential plaintiff in a different matter. Thus, the purpose of the Petition is to further their litigation efforts and relax evidentiary impediments.⁴

With this in mind, VON first emphasizes that the TCPA is “silent on the issue of what form of express consent - oral, written, or some other kind - is required for calls that use an automatic telephone dialing system or prerecorded voice to deliver a telemarketing message.”⁵ The Petition conflates “express” consent with “written, direct” consent, and conversely conflates non-written and non-direct consent with implied consent. There is no support for the Petition’s improper assumption that “express consent” must mean direct consent documented in the form of a “writing.” The Commission carefully developed its policies and rules defining the statutory phrase “prior express consent”⁶ through painstaking legal and industry analysis in addition to extensive public input.⁷

Neither Congress nor the Commission has expressed an intention to require callers to obtain prior express, written, direct consent for all types of telephone calls covered by the TCPA. Rather, the Commission eventually imposed this requirement in the telemarketing context to: (a) harmonize the TCPA with the Federal Trade Commission’s (“FTC”) analogous Telemarketing Sales Rule (“TSR”), as contemplated by the Do-Not-Call Implementation Act (“DNCIA”)⁸ and (b) achieve Congress’ and the Commission’s goals of addressing serious problems unique to

⁴ See *Petition* at.

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, 1838, ¶ 21, n. 53 (2012) [hereinafter *2012 FCC Report and Order*].

⁶ 47 U.S.C. § 227(b)(1)(A)(iii); 47 U.S.C. § 227(b)(1)(B).

⁷ See *2012 FCC Report and Order* at ¶ 21.

⁸ See Do-Not-Call Implementation Act, Public Law No. 108-10, 117 Stat. 557 (2003), codified at 15 U.S.C. § 6101 (stating in Section 3, in relevant part, that the Commission must consult and coordinate with the FTC to maximize consistency with the rule promulgated by the Federal Trade Commission (16 C.F.R. § 310.4(b)). See also *2012 FCC Report and Order* at ¶ 14, n. 42.

telemarketing robocalls and their potential for consumer abuse.⁹ Moreover, the stated policy underlying the FTC’s and the Commission’s heightened consent requirements for telemarketing calls is to enhance enforcement efforts and require an evidentiary record that can “be more readily verified and may provide unambiguous proof of consent.”¹⁰

Currently, the Commission rules require, in relevant part, prior express written consent for telemarketing calls and accompanying disclosures that future telemarketing will be done with autodialer equipment (“ATDS”) and that consent is not a condition of purchase.¹¹ The Commission also accepts “writings” consistent with those allowed by the FTC and E-SIGN Act.¹²

These policies are clearly not at play with non-telemarketing calls, and there is no justification for unnecessarily impeding consumer access to desired information, which, in part, is why the Commission’s rules encompass certain conduct demonstrating a person’s “express con-

⁹ See *2012 FCC Report and Order* at ¶¶ 20, 33. (“Consistent with the FTC’s TSR, we conclude that a consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received ‘clear and conspicuous disclosure’ of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained ‘without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.’”)

¹⁰ *2012 FCC Report and Order* at ¶ 28.

¹¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8012-13, ¶ 98 (2015) [hereinafter *2015 FCC Declaratory Ruling and Order*].

¹² *2012 FCC Report and Order* at ¶¶ 32, 34 (“Consistent with the FTC, we now similarly conclude that consent obtained in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording. Allowing documentation of consent under the E-SIGN Act will minimize the costs and burdens of acquiring prior express written consent for autodialed or prerecorded telemarketing calls while protecting the privacy interests of consumers. Because it greatly minimizes the burdens of acquiring written consent, commenters generally support using electronic signatures consistent with the E-SIGN Act. We conclude that the E-SIGN Act significantly facilitates our written consent requirement, while minimizing any additional costs associated with implementing the requirement.”)

sent.”¹³ The TCPA is a privacy statute meant to prohibit communications that consumers find intrusive.¹⁴ It was never intend to restrict personal communications that consumers’ desire.¹⁵ Indeed, the Commission already considered and previously rejected Petitioners’ proposal to “require written consent for all autodialed or prerecorded calls (*i.e.*, not simply those delivering marketing messages).”¹⁶ The Commission soundly concluded that “requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls.” As part of its analysis, the Commission provided a non-exclusive list of the sort of non-telemarketing calls the Commission (and the public) would not want to restrain under such a restrictive approach: calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, calls pertaining to: a bank account balance, credit card fraud alerts, a package delivery notification, airline notifications, research

¹³ 2012 FCC Report and Order at ¶ 21; *see also*, 2015 FCC Declaratory Ruling and Order at ¶¶ 141 (under certain circumstances involving non-telemarketing calls, “express consent can be demonstrated by the called party giving express oral or written consent, or in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call”).

¹⁴ *See, e.g., GroupMe Petition*, at 13-14 (noting that Congress passed the TCPA to regulate commercial, mass produced speech); GroupMe Comments, CG Docket No. 02-278, at 9-10, 10 n.24, n.25 (filed Aug. 30, 2012) (highlighting that the Congressional record reflects that consumer find such communications less intrusive); Twilio, Inc. Comments, CG Docket No. 02-278, at 2-3 (filed Aug. 30, 2012) (emphasizing that the Congressional records shows that the TCPA was meant to regulate intrusive and unwanted telephone solicitations); U.S. Chamber Comments, CG Docket No. 02-278, at 1-3 (filed Aug. 30, 2012) (citing to official Senate and House reports detailing that the TCPA was passed to address consumer complaints concerning the volume of telemarketing calls and the use of ATDS to place such calls).

¹⁵ *See, e.g., 2012 TCPA Order*, 27 FCC Rcd at 1838, ¶ 21 (requiring prior express written consent “would unnecessarily restrict consumer access to information” of import); CAA Comments, CG Docket No. 02-278, at 3 (filed Aug. 30, 2012) (agreeing that Congress did not enact the TCPA to restrict non-commercial, informational text messages); U.S. Chamber of Commerce Comments, CG Docket No. 02-278, at 11-13 (filed Aug. 30, 2012) (citing to precedent for clarifying that intermediaries can provide consent when text messages are non-commercial and noting that there is no incentive to send unwanted non-commercial communications).

¹⁶ *Id.*

and surveys, wireless usage notifications, and school closing notifications.¹⁷ Moreover, it is for similar reasons that the Commission has determined that intermediate consent based on personal relationships is appropriate for informational messages from non-commercial, social media platforms which allow group discourse on matters of personal interest.¹⁸ Accordingly, the Petition should be denied as it does not reflect the legitimate policies the Commission has previously considered to be consistent with congressional intent and appropriate for the public and the industry.

Second, VON respectfully requests the Commission take into consideration the significant burden and implementation costs Petitioners' proposed revisions would have on nearly all consumer-facing businesses and the industry as a whole.¹⁹ Industry members have relied on the Commission's current rules and guidance to build out business models and technologies around the current definition of consent. Changes such as those proposed by the Petitioners would do very little if anything to increase consumer protection from unwanted telemarketing robocalls and on balance would cause substantial burdens and costs for businesses and the public.

¹⁷ 2012 FCC Report and Order at ¶¶ 21, 25, 28.

¹⁸ Declaratory Ruling, CG Docket No. 02-278 (rel. March 27, 2014) at ¶1.

¹⁹ See *id.* at ¶19 (Commission deciding policy by balancing implementation costs with public benefits).

CONCLUSION

For the foregoing reasons, VON requests the Commission deny the Petition.

Respectfully submitted,

VOICE ON THE NET COALITION

/s/

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